

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

**PITTSBURGH & LAKE ERIE RAILROAD,**  
*Petitioner,*  
v.

**RAILWAY LABOR EXECUTIVES' ASSOCIATION and**  
**INTERSTATE COMMERCE COMMISSION,**  
*Respondents.*

**On Writs of Certiorari to the**  
**United States Court of Appeals**  
**for the Third Circuit**

**BRIEF FOR**  
**GUILFORD TRANSPORTATION INDUSTRIES, INC.,**  
**BOSTON AND MAINE CORPORATION,**  
**MAINE CENTRAL RAILROAD COMPANY AND**  
**SPRINGFIELD TERMINAL RAILWAY COMPANY**  
**AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

**INTEREST OF *AMICI CURIAE***

Guilford Transportation Industries, Inc., a non-carrier holding company, and its rail carrier subsidiaries the Boston & Maine Corporation, Maine Central Railroad Company and Springfield Terminal Railway Company

(hereinafter collectively referred to as "Guilford") are respondents in *Railway Labor Executives' Ass'n v. Guilford Transportation Industries, Inc., petition for certiorari pending*, No. 87-1911. *Guilford* involves an attempt by the Railway Labor Executives' Association ("RLEA") to obtain a Railway Labor Act ("RLA") "status quo" injunction preventing implementation of rail line leases among the *Guilford* railroads authorized by the Interstate Commerce Commission ("ICC") until the railroads exhaust the "long and drawn out" RLA bargaining, or "major dispute," procedures over their right to implement the leases.<sup>1</sup> Section 11343 of the Interstate Commerce Act ("ICA") required ICC authorization of the leases, and they were approved by the ICC through an exemption under § 10505 of the ICA from the lengthy prior approval procedures ordinarily applicable under §§ 11344-11345.<sup>2</sup> Under § 10505(g), such approvals of § 11343 transactions remain subject to mandatory labor protection under § 11347 of the ICA.<sup>3</sup>

The First Circuit held that any RLA status quo and bargaining duties that the railroads might otherwise have with respect to the leases are preempted by § 11341(a) of the Act, which provides that the ICC's jurisdiction under §§ 11341-11351 "is exclusive," and that a carrier participating in a transaction subject to

<sup>1</sup> See *Railway Clerks v. Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966).

<sup>2</sup> The ICA is codified as Subtitle IV of 49 U.S.C., and citations in this brief to sections of the ICA refer to the corresponding sections of 49 U.S.C.

<sup>3</sup> Leases under § 11343 are subject to the ICC's so-called *Mendocino* labor protections, as a statutory minimum. See *Mendocino Coast Ry.—Lease & Operate, California Western R.R.*, 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). In *Guilford*, however, the ICC exercised discretionary jurisdiction under § 11347 to impose other labor protective conditions, in addition to *Mendocino*. See n.10 *infra*.

those provisions "is exempt from the antitrust laws and from *all other law* \* \* \* as necessary to let that person carry out the transaction \* \* \*." (Emphasis added). RLEA's petition for certiorari seeking review of that decision (No. 87-1911) raises essentially two questions: (1) whether § 11341(a) immunity applies to RLA obligations that might otherwise prevent a carrier from carrying out a § 11343 transaction as approved by the ICC; and (2) if so, whether that immunity is lost when the ICC employs expedited approval procedures under § 10505, even though the § 10505 procedure does not affect the ICC's "exclusive" jurisdiction over labor protection or its mandatory duty to impose such protection under § 11347.

RLEA has maintained that *Guilford* is the "best vehicle" for deciding a quite different question, presented here in No. 87-1888 ("P&LE II"): whether the RLA must be accommodated to the ICA in line sales subject to § 10901 of the ICA and approved under § 10505 procedures, to which neither the express immunity provision in § 11341(a) nor the provision for mandatory labor protection in § 11347 applies.<sup>4</sup> This Court evidently did not agree that *Guilford* is the best vehicle to decide that question, for it granted certiorari on the question in *P&LE II*, not in *Guilford*. The Court, however, is holding the petition for certiorari in *Guilford* in abeyance pending the decision in *P&LE II*, with which No. 87-1589 ("P&LE I") has been consolidated. That circumstance necessarily gives *Guilford* an interest in the outcome here. Whatever the outcome in *P&LE II*, however, there is no occasion for this Court to grant review of *Guilford*: if the Court should hold (as we believe it should) that the RLA must be accommodated to the ICA

<sup>4</sup> See Petition for A Writ of Certiorari to the United States Court of Appeals for the First Circuit, No. 87-1911, at 24-25; Supplemental Brief for Railway Labor Executives' Association, Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464, page 7.

in § 10901 cases, to which § 11341(a) does not apply, it would follow *a fortiori* that the judgment of the First Circuit in *Guilford* in favor of the railroads should be left standing (or affirmed); but the First Circuit's decision with respect to § 11341(a) can and should still be left standing (or affirmed) even if this Court should conclude that the RLA need not be accommodated in § 10901 transactions.<sup>5</sup>

#### SUMMARY OF ARGUMENT

Guilford submits that the decision of the United States Court of Appeals for the Third Circuit in *P&LE II*, that the RLA need not be accommodated to the ICA in § 10901 transactions, should be reversed for reasons stated in the briefs of petitioner and the various *amici* in support of petitioner.<sup>6</sup> Even if this Court should affirm that holding, however, its decision on the accommodation question under § 10901 should not affect the well-settled law that the RLA is preempted by § 11341(a) in transactions subject to §§ 11343 and 11347 to the extent "necessary to let [a carrier] carry out" such a transaction as

<sup>5</sup> RLEA has pointed out that the First Circuit decision in *Guilford* followed an earlier decision of that court that relied on an alternative "collateral attack" theory under the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342(5), in holding that an RLA status quo injunction against an ICC-approved § 11343 transaction was barred, as well as on § 11341(a), *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986), and that the collateral attack issue is also presented in *P&LE II*. Although we believe that the Third Circuit erred in rejecting the collateral attack theory, this Court's disposition of that issue should not affect the *Guilford* case, because the judgment below is fully supported by § 11341(a) alone, and indeed, neither the district court nor the court of appeals referred to the collateral attack theory in its decision.

<sup>6</sup> We also believe that *P&LE I* was wrongly decided by the Third Circuit and should be reversed, but the Norris-LaGuardia Act accommodation question presented in that case is not involved in *Guilford*.

approved by the ICC, even where a particular transaction is approved by expedited procedures under § 10505 of the Act. As the lower courts have unanimously recognized, the plain language of both § 11341(a) and § 10505 mandate that result, and no construction of § 10901 in this case could require a different result.

#### ARGUMENT

##### **Whether Or Not The RLA Should Be Accommodated To The ICA In § 10901 Transactions, It Is Expressly Preempted In Transactions Governed By § 11341(a)**

As the Solicitor General has demonstrated, given the ICC's comprehensive jurisdiction over "labor disputes arising out of approved transactions," the ICC "would presumably have authority to approve [transactions] that override RLA rights even in the absence of Section 11341(a)'s express exemption," such as the line sale at issue in *P&LE II*. Brief for the Interstate Commerce Commission and the United States of America, *ICC v. Brotherhood of Loc. Engineers*, Nos. 85-792 and 85-793, p. 40 n.25. No other result would appropriately reconcile the RLA and the ICA.<sup>7</sup> But, however that may be, as the Solicitor General also pointed out, § 11341(a) "clearly grants an automatic exemption from any federal, state, or local law that would otherwise prevent a party from carrying out a term of an approved [§ 11343] transaction," and thus "Section 11341(a) exempts participants"

<sup>7</sup> The Solicitor General was clearly correct. Among other things, although § 11341(a) and its predecessor, former § 5 of the ICA, do not apply to transactions governed by § 10901 and its predecessor in former § 1(18), this Court has expressly held that the ICC's jurisdiction over transactions subject to § 1(18) is "exclusive and plenary," and that such exclusivity is "critical to the congressional scheme" under the ICA. *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). As the Court also noted, the recodification of the ICA in what is now subtitle IV of 49 U.S.C. was "without substantive change" in this regard. *Id.* at 319 n.7.

to such a transaction "from the otherwise applicable labor law" where that is necessary to ensure that the approved transaction can be implemented. *Id.* at 34-35, 34 n.21, 46 n.29.<sup>8</sup>

That is always necessary with respect to RLA major dispute procedures insofar as those procedures are contended to require bargaining over union proposals respecting the making of a § 11343 transaction or its effect on employees. Pending the exhaustion of these "purposely long and drawn out" procedures, a carrier cannot take any unilateral action not authorized by existing agreements, "based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks v. Florida E.C. R. Co.*, *supra*, 384 U.S. at 246. But the parties are "wholly free, at their own will, to agree or not to agree," and "[n]o authority is empowered to decide the dispute and no such power is intended unless the parties themselves agree to arbitration." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 725 (1945). Upon exhaustion of the major dispute procedures unions are free to resort to self-help, including strikes and nationwide secondary picketing, to block carriers from making changes that the unions oppose. *Florida E.C. R. Co.*, *supra*, 384 U.S. at 244; *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

These major dispute procedures cannot be applied to ICC-approved transactions without subjecting them to the threat of frustration: "Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate

<sup>8</sup> The Court decided *ICC v. Brotherhood of Loc. Engineers* on procedural grounds and thus did not reach the preemption issue. 107 S. Ct. 2360 (1987). However, a concurrence by Justice Stevens and three other Justices agreed with the Solicitor General (and the ICC, among others), that any requirements of the RLA inconsistent with a § 11343 transaction are preempted by § 11341(a). 107 S. Ct. at 2370, 2374-78.

new working rules or conditions [necessary to implement an ICC-approved transaction under the statutory predecessor to § 11343], the application of the Railway Labor Act \* \* \* would threaten to prevent many [such transactions] and, therefore, should not be applied." *Nemitz v. Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). Accordingly, every court of appeals to have considered the question has concluded that the ICA preempts the RLA's major dispute procedures in transactions governed by § 11343 or its predecessors.<sup>9</sup> No other result is possible, given the plain language of § 11341(a), regardless of whether or not the RLA must be accommodated to the ICA in § 10901 transactions to which § 11341(a) does not apply.

Moreover, whatever this Court's view of the arguments of petitioner and other *amici* in this case that the ICC has exclusive jurisdiction to resolve labor disputes arising from § 10901 transactions, § 11341(a) expressly provides that the ICC's jurisdiction in that regard under § 11347 with respect to § 11343 transactions is "exclusive." That is so even where, as in *Guilford*, a § 11343 transaction is approved by means of an exemption under § 10505 from §§ 11344-11345 procedures, because § 10505(g) provides that the ICC may not use a § 10505 exemption to "relieve a carrier of its obligation to protect the inter-

<sup>9</sup> *Id.*; *United Transp. Union v. Norfolk & W. Ry.*, 822 F.2d 1114, 1122 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988); *Missouri Pacific R.R. v. United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987); *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, *supra*, 788 F.2d at 799-801; *Burlington Northern, Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Loc. Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Texas & N.O. Ry. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151, 161-62 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

ests of employees as required by [the ICA]." Thus where a § 11343 transaction is exempted under § 10505, the ICC must still exercise its mandatory labor protection jurisdiction under § 11347.<sup>10</sup> Under § 11341(a), that jurisdiction is "exclusive," and therefore in exempted § 11343 transactions § 11341(a) precludes the application of alternative labor dispute procedures under the RLA,<sup>11</sup> regardless of the effect of § 10505 exemptions on § 10901 transactions not subject to § 11347.

## CONCLUSION

The decision below in *P&LE II* should be reversed on accommodation grounds, or on the alternative ground that the union's demands in that case are not mandatory subjects of bargaining under the RLA. Whatever the Court's disposition of *P&LE II*, however, the Court is not called upon to, and should not, disturb the well-settled law under § 11341(a), and the Court's decision in *P&LE II* should not lead it to grant the petition for a writ of certiorari in *Guilford*.

Respectfully submitted,

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<sup>10</sup> Indeed, the ICC exercised that jurisdiction in *Guilford* to impose "extraordinary labor protective conditions" that exceed the statutory minima. (See Appendix to Petition for Certiorari, No. 87-1911, at 18a, 30a-31a).

<sup>11</sup> See *United Transp. Union v. Norfolk & W.*, *supra*, 822 F.2d at 1122 ("The requirement that the Commission impose labor protective conditions when it exempts a transaction from prior review merely substitutes one form of continuing [ICC] oversight for another," and hence § 11341(a) is applicable to exempted § 11343 transactions); accord *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, *supra*, 788 F.2d at 799-801.